

**JONES AND JONES**

**COUNSELLORS AT LAW**

**45 ESSEX STREET**

**HACKENSACK, N.J. 07601**

**(201) 487-3600**

340069



**WALTER H. JONES III  
GRANAM O. JONES**

**A. RICHARD ROSS  
JOSEPH O. SULLIVAN**

**WALTER HENRY JONES  
1937-1982**

**May 21, 1985**

**Margaret Thompson  
Law Clerk  
Waste & Toxic Substance Branch  
United States Environmental Protection Agency  
Region III  
26 Federal Plaza  
New York, New York 10278**

**Re: Duane Marine Salvage Corporation Site  
Perth Amboy, New Jersey  
Administration Orders No. II-CERCLA-50102  
and - 50105**

**Dear Ms. Thompson:**

Please be advised that our office represents Hoke Incorporated (hereinafter referred to as "Hoke"), One Tenakill Park, Cresskill, New Jersey 07626 in connection with the above-captioned matter. This is a petition by Hoke to be removed as a respondent to Administrative Orders II-CERCLA-50102 and - 50105 and all related orders and proceedings in connection with the Duane Marine Salvage Corporation (hereinafter referred to as "Duane Marine") in Perth Amboy, New Jersey.

Between May 10, 1975 and October 24, 1979, Hoke retained Duane Marine to pick up for disposal one hundred forty-six fifty-five gallon drums containing 8030 gallons of metal hydroxides which were generated from Hoke's place of business. In late October, 1979, it came to the attention of Hoke management that a potential problem existed concerning the continued disposal by Hoke of metal hydroxides through the use of the service of Duane Marine. On or about December 27, 1979, Duane Marine was notified by Hoke management that Hoke would no longer contract with it as its waste facility operator. On May 22, 1980, Mr. George A. Heine, the Manager of Plant Engineering and Maintenance at Hoke visited the Duane Marine site and saw approximately eighty-seven clearly marked Hoke drums in good condition which he determined were the only Hoke drums on the site. Insomuch as it appeared that Duane Marine was disposing of the

waste material on its site in an orderly fashion, Mr. Heine made arrangements for the removal and disposal of the contents of the Hoke drums with Duane Marine and relied on the promise of Duane Marine representatives that this would be done. On June 23, 1980, Mr. Heine revisited the Duane Marine site and he was convinced by visual inspection that Duane Marine had fulfilled its agreement and that there no longer were any Hoke drums located at the site. A more detailed description of these events is set forth in the enclosed Affidavit of Mr. Heine. Plainly, there were no Hoke materials on the site at the time your agency issued the above-referenced Orders.

Hoke cannot be found liable under §42 U.S.C. §9607(a) as a person who arranged for the disposal of a hazardous substance for reason that there has been no release within the meaning of the statute. The statute in pertinent part defines liability for persons who arrange for the disposal of a hazardous substance as follows:

- (a) Notwithstanding any other provisions or rule of law, and subject only to the defenses set forth in subsection (b) of this section....(3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility owned or operated by another party or entity and containing such hazardous substances, and (4)... from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for:

- (A) all costs of removal or remedial action incurred by the United States Government or a State not inconsistent with the national contingency plan; (B) any other necessary costs of response incurred by any other person consistent with the national contingency plan; and
- (C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release.

The statutory definition of release in 42 U.S.C. §9601 (22) is as follows:

"release" means any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment....

Under the statute a person cannot be found liable if through his conduct in arranging for the disposal of hazardous waste no release of hazardous materials occurs. The clear meaning of the statutory definition is that the hazardous substance be introduced into the environment through discharge or otherwise. If the integrity of containers containing a hazardous substance is maintained and if the hazardous substance is properly disposed of at the site there can be no release on which to premise a finding that a person is liable.

The allegations of the complaint in this matter are in accordance with statutory interpretation to the effect that a release of hazardous substance is a predicate for liability. The complaint alleges that Hoke as a generator respondent is responsible for the release of hazardous substances into the environment. The affidavit of George Heine negates as a factual matter that such a release took place. On behalf of Hoke, Mr. Heine engaged in the course of action the purpose of which was to insure that the hazardous substances which Hoke had sent to the Duane Marine site were properly disposed of. On the occasion of his first visit to the Duane Marine Site, he determined that they were in good condition and made arrangements for their disposal by Duane Marine. On the second occasion of his visit to the site, he determined that the drums were no longer there and had been properly disposed of. From these observations it must be determined that the hazardous substance in the Hoke drums were not released at the Duane Marine site. Hoke cannot be found to be the responsible party under the statute and in accordance with the allegations of the complaint.

Please contact me at (201) 487-3600 if you have any questions about the Affidavit or any of the documents submitted.

Very truly yours,

  
Joseph O. Sullivan

JOS:mt

cc: Mrs. Janet Feldstein (encl.) ✓

Enclosure

IN THE  
UNITED STATES ENVIRONMENTAL  
PROTECTION AGENCY  
REGION II

IN THE MATTER OF AMERICAN CAN,	:	ADMINISTRATIVE ORDER
INC., ET AL.,	:	INDEX NO. II -
	:	CERCLA - 50102
Respondents,	:	DUANE MARINE SALVAGE
	:	CORP.
Proceeding Pursuant to \$106 of	:	
Comprehensive Environmental	:	AFFIDAVIT OF
Response Compensation and	:	<u>GEORGE A. HEINE</u>
Liability Act, 42 U.S.C. \$9606	:	

STATE OF NEW JERSEY       )  
                                  :    ss.  
COUNTY OF BERGEN         )

GEORGE A. HEINE, being duly sworn in accordance with law, hereby deposes and says:

1. I am the Manager of Plant Engineering and Maintenance at Hoke, Incorporated (hereinafter referred to as "Hoke"), One Tenakill Park, Cresskill, New Jersey 07626, and I am familiar with the facts that gave rise to the application. I make this affidavit in support of the application of Hoke to be withdrawn as a respondent in the above-captioned Administrative Order.

2. On May 10, 1975, Duane Marine Salvage Corporation (hereinafter referred to as "Duane Marine") picked up for disposal twenty-five (25), fifty-five gallon drums containing 1375 gallons of metal hydroxides from

Hoke's place of business.

3. On June 7, 1979, Duane Marine picked up for disposal another twenty-five (25), fifty-five gallon drums containing 1375 gallons of metal hydroxides from Hoke's place of business.

4. On June 20, 1979, Duane Marine picked up for disposal twenty-five (25), fifty-five gallon drums containing 1375 gallons of metal hydroxides from Hoke's place of business.

5. On August 24, 1979, Duane Marine picked up for disposal thirty-one (31), fifty-five gallon drums containing 1705 gallons of metal hydroxides from Hoke's place of business.

6. On October 24, 1979, Duane Marine picked up for disposal forty (40), fifty-five gallon drums containing 2200 gallons of metal hydroxides from Hoke's place of business.

7. Duane Marine picked up for disposal all of the above drums as a special waste facility operator and undertook to properly and lawfully dispose of the metal hydroxides in accordance with the requirements of the New Jersey Department of Environmental Protection Solid Waste Administration. Hoke paid Duane Marine for these services in the amount of \$3,650.00.

8. In late October, 1979, it came to my attention that a potential problem existed concerning the continued

disposal by Hoke of metal hydroxides through the use of the services of Duane Marine. At that time, Duane Marine was involved in litigation concerning stored hazardous waste at its site at 26 Washington Avenue, Perth Amboy, New Jersey (hereinafter referred to as "site"). Consequently, I began to consider other approved disposal facilities to be used by Hoke for the disposal of metal hydroxides.

9. On or about December 27, 1979, I notified Duane Marine that Hoke would no longer contract with it as its waste facility operator. On that date I sent a Purchase Order to Duane Marine which effectively cancelled the Blanket Order previously placed in effect on April 27, 1979 by Hoke for the disposal of metal hydroxides by Duane Marine.

10. On May 22, 1980, I visited the site to determine whether or not Duane Marine had properly disposed of the drums containing metal hydroxides transferred to the site from Hoke's place of business in accordance with the contractual arrangements previously established by Hoke with Duane Marine.

11. On that day, upon my arrival at the site, I held a brief meeting with Mr. Edward Lecarraux, the owner of the site, and Mr. Vincent Q. (sic), the foreman at the site, and told them the purpose of my visit.

12. In response to my request to be shown all of the Hoke drums on the site, Mr. Vincent Q. (sic) escorted me

to the location on the site approximately forty (40) to eighty (80) feet north of the concrete dike/wall surrounding the 250,000 gallon storage tank and approximately forty (40) to sixty (60) feet west of the Arthur Kill. In that area, there were approximately eighty-seven, fifty-five gallon drums in two rows. I determined this number of drums by making a rough count. Some of the drums were marked with stenciled-on white paint: "Hoke, Inc., Cresskill, N.J.," followed by the Manifest Number pursuant to which the drums were taken to the site. Other drums had bright-yellow stickers placed on them identifying that the drums were taken from Hoke's place of business. The drums were black and the stickers and stenciled-on lettering were distinguishable. These drums appeared to me to be those from shipments on June 20, 1979, August 24, 1979 and October 24, 1979. It was indicated to me that all other drums that had been shipped by Hoke to the site had been properly disposed of. From my observation, I was satisfied that there were no other Hoke drums on the site.

13. The two rows of Hoke drums that I observed were neatly stockpiled and were in good condition. They were in the same good condition they were in when shipped from Hoke.

14. I told Mr. Vincent Q. (sic) that Hoke planned to have those drums removed from the site by a third party. Mr. Vincent Q. (sic) told me that Duane Marine was

systematically removing all of the drums on the site under the supervision of the State of New Jersey and in accordance with a court mandate to do so. He further stated that the Hoke drums and contents would be removed and properly disposed of within thirty (30) days of that date. I acquiesced in Mr. Vincent Q.'s course of disposal because it appeared to me that Duane Marine, by court order, was going about the disposal of materials in an orderly way. At that time I told Mr. Vincent Q. (sic) I would return to the site in order to determine whether or not Duane Marine completed the disposal of the contents of the drums transferred from Hoke's place of business. Mr. Vincent Q. (sic) agreed to allow me to revisit the site when thirty (30) days expired.

15. On June 23, 1980, I revisited the site to confirm that the drums taken from Hoke's place of business to the site were removed from the site and that their contents were properly destroyed. On that day, an employee of Duane Marine escorted me to the location on the site where I had seen the Hoke drums on my previous visit and I saw that the drums were no longer stored at that location. From that vantage point, I could see the entire site. I observed that there were no longer any Hoke drums on the site. The bright-yellow stickers and the white stenciled-on lettering made the Hoke drums easily identifiable and I did not see any drums with those markings on them.

16. I was convinced by my visual observation after



revisiting the site, that as of that date, June 23, 1980, there were no longer any drums located on the site that were taken to it from Hoke's place of business.

17. In summary, on May 22, 1980, I visited the site and saw approximately eighty-seven clearly marked Hoke drums in good condition which I determined were the only Hoke drums on the site. I made arrangements for the removal and disposal of the contents of the same and relied on the promise of a Duane Marine representative that this would be done. On June 23, 1980, I revisited the site and I was convinced Duane Marine had fulfilled its agreements and that there no longer were any Hoke drums located at the site.

  
George A. Heine

Sworn to and subscribed before  
me this ~~15th~~ day of April, 1985.  
ROSALIE B. MONOPOLI  
NOTARY PUBLIC OF NEW JERSEY  
MY COMMISSION EXPIRES DEC. 19, 1988

 -4-15-85